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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 551

CLEO FRANCIS HUGHES, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY TO BRIEF FOR UNITED STATES IN OPPOSITION

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STATEMENT

The opinions below, statement of jurisdiction, questions presented for review and arguments have heretofore been set forth in the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. This Reply to the Government's Brief in Opposition is directed toward demonstrating that in the Government's Brief there was and is a complete failure to meet primary and fundamental questions raised by the Petition for Writ of Certiorari. These are:

> Whether the court erred in permitting the introduction of evidence of other crimes and offenses

with no direct proof that the defendant had committed such other acts; and

Whether the court erred in failing to fully and properly instruct the jury as to the necessity of connecting the defendant with such other crimes,

and whether thereby the defendant was denied a fair trial and due process of law.

ARGUMENT

1. The Government in its Brief in Opposition has cited six cases to support its contention that the evidence of other crimes and offenses was proper. (Brief in Opposition, p. 7) However, in each situation relief upon the defendant was positively and directly shown to have committed the "other crimes" and the evidence fell clearly within one of the recognized exceptions to the rule. These cases, in the order cited, are summarized as follows:

In *Lisenba* v. *California*, 314 U.S. 219, evidence of a prior "wife murder" to collect life insurance was admitted in a homicide prosecution of a husband to show "intent, design and system." There was no question but that the defendant had committed the "other crime".

Roe v. *United States*, 316 F.2d 617 (1963), involved a prosecution for failure to register securities before the SEC. Evidence that promotional material and unregistered securities, other than the "indictment securities", had been sent through the mails was admitted to show a common scheme and plan. Again there was no question but that the defendant had actually perpetrated the "other crimes".

In *Halfen* v. *United States*, 321 F.2d 556 (1963), the defendant was prosecuted for transporting a forged money order in interstate commerce. The chief witness for the prosecution did not positively identify the defendant as the person who had cashed the forged money order on which the indictment was returned. The trial court properly admitted evidence by four other witnesses who cashed forged money orders *from the same series* and who made *positive identification* of the defendant. In the opinion Circuit Judge Wisdom cited with approval *Labriosa* v. *Gov't of the Canal Zone*, 198 F.2d 282. The *Labriosa* case, cited in the Petition for Writ of Certiorari (pp. 10, 11, 12), holds that the evidence of "other crimes", if admissible under a recognized exception, must establish the other crimes, the accused's connection therewith, and where there is doubt as to whether such evidence will prove the identity of the accused that doubt should be resolved in favor of the accused and the evidence rejected.

Doty v. *United States*, 10 Cir., 261 F.2d 10, involved a prosecution for perjury relative to testimony about bribery. The court permitted evidence of briberies both prior and subsequent to that occurrence claimed the subject of perjured testimony to show a common scheme or plan. Here again the direct and positive connection of the defendant to such "other crimes" was clearly established.

In *United States* v. *Frascone*, 2 Cir., 299 F.2d 824, the "other crimes" evidence objected to consisted of evidence elicited by defendant's own counsel on cross examination of a government witness. This concerned a statement that the defendant's picture had been viewed in police files—again no question of identity

insofar as the implication of "other crimes" was concerned.

United States v. *Iacullo*, 7th Cir., 226 F.2d 788 (1955), was concerned with a prosecution for substantive violations and conspiracy (with co-defendants) to violate the narcotics laws. Evidence of a purchase of narcotics by a government agent when the defendant was not present was admitted. This was held proper to show the common scheme or plan involved in the various illegal sales and in the conspiracy itself. On the particular sale objected to the evidence showed that the defendant's fingerprint was on the wrapper in which the heroin was wrapped. Thus, the defendant was positively connected to the "other crime" and the evidence was properly admitted under a recognized exception to the general rule.

Thus, the government did not cite a single case where evidence of "other crimes" was permitted against a defendant under an exception to the general rule where the defendant was not positively and clearly shown to be the perpetrator of the "other crimes".

2. In the Brief in Opposition, at page 4, the government states that the petitioner was "shown by the evidence" to be the author of dittoed writings distributed in the neighborhood of the complaining witness. This was not so shown, but the trial court's instruction led the jury to make the erroneous assumption that it was established simply through their introduction into evidence. The trial court did not instruct the jury that it should first decide as a matter of fact that these filthy writings, not sent through the mails and extraneous to the indictment, were authored by the defendant. In fact, the court misled

the jury by instructing them that they could consider these writings to determine whether the defendant authored and mailed the writings set forth in the indictment which quite obviously led the jury to assume that this fact had been established. (Tr. pp. 170-171)

Before evidence of "other crimes" could properly have been admitted the connection of the defendant therewith should have first been established. If an accused is to be "identified" through evidence of other crimes it is fundamental that the identity of the accused as the perpetrator of the "other crimes" must be shown by clear, substantial and direct evidence, and full and proper instructions in relation to such evidence must be given by the trial court. This is an absolute necessity to a fair trial. The Petitioner was refused the protection of these fundamental tenets to a fair trial and denied due process of law.

CONCLUSION

It is respectfully submitted that the Petition heretofore filed be granted and the Writ issue.

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